In the District Court for Philadelphia County, December, 1857.

RUNYAN *vs.* REED.

1. Payment of a promissory note by the maker before maturity does not extinguish it as against a bona fide holder, without notice.
2. When a note has been paid by the maker before maturity, his indorsement would be notice of that fact to the holder.
3. But such indorsement is not itself evidence of payment. It is, when standing unexplained, evidence that the indorsements prior to the name of the maker were for his accommodation.

The facts of this case are sufficiently stated in the opinion of the court.

Mr. George W. Biddle, for the plaintiff.
Messrs. Mitcheson and G. M. Wharton, for defendants.

The opinion of the court was delivered by

SHARSWOOD, P. J.—This was an action against the defendants as indorsers of a promissory note drawn by *Osmon Reed* in favor of James L. Whetham, dated Nov. 22, 1856, at six months, for $600. The note and notarial protest were given in evidence; by which it appeared that when the note matured, and payment was demanded, the indorsements, besides that of Whetham, the payee, were "Isaac Reed & Son, (the present defendants,) *Osmon Reed*, George K. Childs and M. J. Runyan," (the plaintiff.) Before giving the note in evidence, the plaintiff's counsel at the bar struck out all the indorsements subsequent to that of Isaac Reed and Son, the defendants. A verdict was taken for the plaintiff for the amount of the note, and the question was reserved, whether upon this evidence the plaintiff was entitled to recover.

The striking out the indorsements by the plaintiff, at the trial, ought not to prevent the defendant from taking advantage, as matter of defence, of the fact that the indorsements thus stricken out were

there, if they are evidence from which a defence may be inferred. We may assume, also, upon the common presumption that Osmon Reed the maker, and Osmon Reed the indorser, were the same person. Perhaps, also, as against the plaintiff producing the note, the presumption is, that the handwriting of Osmon Reed, the indorser, is genuine. It is unnecessary to decide that point here, but certainly if the plaintiff had been sued as indorser by a subsequent holder, his indorsement would have been an admission of the genuineness of all the signatures preceding his own. The fact also unquestionably appears from the protest that Osmon Reed's name was indorsed, and the plaintiff became the holder of the note, before it matured.

It may be conceded as settled that if the note, after it had been executed and delivered, so as to be an available security against the maker, had been paid by him, or if he had bought it in the market, he could not re-issue it, so as to revive the liability of any other party, who had been thereby discharged, unless indeed in the hands of a bona fide holder before maturity, and without knowledge that it had been so paid. *Beck* vs. *Robley*, 1 H. Black. 89, n. "I agree," says Lord Ellenborough, "that a bill paid at maturity cannot be re-issued, and that no action can afterwards be maintained upon it by a subsequent endorsee. A payment before it becomes due, however, I think does not extinguish it, any more than if it were merely discounted. A contrary doctrine would add a new clog to the circulation of bills and notes; for it would be impossible to know whether there had not been an anticipated payment of them. It is the duty of bankers to make some memorandum on bills and notes, which have been paid, and if they do not, the holders of such securities cannot be affected by any payment made before they are due." *Burbridge* vs. *Manners*, 3 Campb. 193; Byles on Bills, 133; Story on Prom. Notes, §§ 180, 384.

If then a note be paid or taken up by the maker at or after maturity, it cannot be re-issued so as to render any of the indorsers upon it liable without their consent. If paid or taken up by the maker before maturity, a subsequent indorsee who takes it bona fide and for a valuable consideration, may recover upon it: unless at the

time he received it, he had knowledge or notice of the fact of such payment.

If then the legal inference from the indorsement of Osmon Reed is that the note was paid or bought by him after it had been originally put in circulation, the plaintiff ought not to be allowed to hold this verdict. The name of Osmon Reed was on the note as indorser when she took it. She had notice of all that the law infers from that fact. The question then is reduced to this; was the indorsement evidence of the fact of such payment or purchase?

What was the legal effect of this indorsement made by the maker under these circumstances? It was not necessary in order to pass the title. The note had already been indorsed in blank, and was now practically payable to bearer. Supposing Osmon Reed to have become possessor of the note by payment or purchase he could have passed it by simple delivery. The indorsement did not vary Osmon Reed's liability as maker. It did not convert his absolute promise into a conditional one only. What then was its effect? If it had any use or effect whatever it was to operate as an admission by him as maker that the signatures of the indorsers then on the note were genuine. In this respect it may have been valuable to the subsequent holders when they should come to proceed against Osmon Reed as maker.

What then can we infer from the indorsement more than the fact that at the time he put his name on the back of the note, Osmon Reed was in possession of the instrument—in lawful possession? Does it necessarily follow that he had title—paid or bought it? It may be *prima facie* evidence that he then owned it, or, which is the same thing, had authority to dispose of it; but not that it had already been in circulation, and that he had anticipated its payment Possession by him after maturity would be evidence that he had paid it; but before maturity the presumption, in the first instance, is, that it has not been paid. Without evidence of such payment by anticipation, the law will presume rather that he holds possession as the agent of or for the use of the holder, or that the note has been indorsed by the parties, whose names are then on it, for his accommodation. Suppose Osmon Reed's name had not been indorsed,

and suppose that the defendants here had proved by witnesses that the plaintiff purchased this note of Osmon Reed the maker, knowing him to be the maker, and paid into his hands the money for it, would that evidence have precluded her recovery? The authorities are very clear that it would not. It would have been evidence that the note had been indorsed for the maker's accommodation, and so far as that fact might form an element of any defence, the possession by the maker of an indorsed note is sufficient *prima facie* not only to affect the holder with notice, but to prove the fact itself. *Parke* vs. *Smith*, 4 W. & S. 289; *Wallace* vs. *Branch Bank*, 1 Alabama, 565; *Mauldin* vs. *Branch Bank*, 2 Alabama, 502.

In these cases and others which may be found cited in them, the note either expressly on its face was for value received, or such was the implication of law. Prima facie every negotiable bill or note is so. Prima facie the note sued on was a business note—given for value. But when, after it has been indorsed by the payee, it is put in circulation by the maker, that presumption is rebutted and a new presumption arises that the indorser or indorsers have given their names for the maker's accommodation, and have authorized him to offer it for discount. Common experience is the mother of presumption; and common experience is all in favor of the doctrine that possession by the maker of indorsed paper, before maturity, is evidence, not of premature payment, but of want of consideration. It would lay the axe at the root of accommodation paper, according to the present mode of business, to hold that whenever a note is taken from the maker the indorser is discharged, unless the holder could prove affirmatively in reply that it was an accommodation note. Such would be practically the result of deciding that mere possession by the maker is evidence of payment.

We think the indorsement by itself is evidence of nothing beyond the fact of such possession. It may be argued that when he indorsed the note, the maker assumed to be the owner by transferring it. But certainly no more than by delivery, which would just as effectually have transferred it, inasmuch as it was indorsed in blank. If it was an accommodation note, he *was* the owner of it. Such paper is a loan to the maker, of the credit of the indorser and au-

thorizes him to use it for any purpose for which negotiable business paper may be used. *Appleton* vs. *Donaldson*, 3 Barr, 381. "Credit the drawer" was formerly written and signed by the indorser on the face of such notes, intended to be offered for discount at banks. Otherwise, in order that the proceeds should pass to the credit of the maker, he must indorse his name, or procure the check of the indorser for the amount. It is understood that the banks have for many years refused to discount notes thus bearing upon their face evidence of their fictitious character. "Credit the drawer" is what every accommodation indorser says, who places the note in the hands of the maker. The amount of such paper however, actually offered and discounted has not been in the least diminished by merely changing the form in which it is done. The maker in all cases of this character exercises full power over the note; he does, in fact, transfer it, though he may not place his name on the back of it. Why, then, shall the holder, receiving it from the hands of the maker—purchasing it from him—paying him the money for it—be allowed to recover, while with only the addition of his name on the back—whether innocently or maliciously placed there—he shall lose his security? It would be to make a distinction where there is no difference in fact or in principle.

If the defendants here had proved that in point of fact after the note was put in circulation, Osmon Reed paid it or bought it in the market, then the circumstance that his name was on the back of the note would have been sufficient to have affected the plaintiff with notice. It was out of the usual course of a business transaction, and therefore enough to put her on inquiry as to what was the true state of the case. But the defendants have offered no evidence of payment in fact. Is the burthen of proving payment upon them or upon the plaintiff? The defendants insist that the indorsement alone is sufficient prima facie evidence of payment. Unless that is so, the plaintiff is entitled to judgment upon the verdict. It has not been made out either upon principle, or by authority, to our satisfaction, and, therefore, we discharge this rule for a new trial, and enter judgment for the plaintiff upon the point reserved.